IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(TP)A No.418/Bang/2023
Assessment year : 2017-18

Amazon Seller Services Private Limited, No.26/1, 8th Floor, World Trade Centre Brigade Gateway, Dr. Rajkumar Road, Malleswaram (W), Bengaluru – 560 055. **PAN: AAICA 3918J**	Vs.	The Commissioner of Income-Tax (TP), Bengaluru-1, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ajay Vohra, Sr. Advocate, Ms. Deepashree Rao, CA & Sri Hardeep Singh Chawla, Advocate
Respondent by	:	Capt. Pradeep Arya, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.12.2023
Date of Pronouncement	:	20.02.2024

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the DIN & Order No.ITBA/COM/F/17/2022-23/1051582070(1) dated 29.3.2023 of the Commissioner of Income-tax (TP) [CIT] passed u/s. 263 of the Act for the AY 2017-18.

2. The brief facts of the case are that the assessee is a wholly owned subsidiary of Amazon Corporate Holdings Private Limited engaged in rendering marketing support services, market place services and in wholesale trading of e-book reader device (kindle) along with accessories. The assessee field return of income for AY 2017-18 on 30.11.2017 declaring a loss of Rs.(-) 45,22,69,62,791. The case was selected for scrutiny through CASS and statutory notices were served on the assessee. The assessee had international transactions with its AE and the case was referred to the TPO after approval from the competent authority. The TPO passed order on 28.01.2021 and accordingly the AO passed the final assessment order on 24.05.2021.

3. The ld. CIT(TP) on examination of records noted that the assessee has recognized the expense on account of share based compensation transactions and the TPO allowed exclusion of share based compensation(SBC) in the form of ESOP cost from the operating cost and also excluded depreciation and amortization from the operating cost without due inquiry/verification. It was noted that while delivery charges and related warranty charges are to be considered in AMP expenses, the TPO has excluded delivery charges and warranty charges from the AMP expenses without due inquiry/verification while determining the AMP adjustment. Therefore, the ld. CIT(TP) considered the TPO's order dated 28.01.2021 as erroneous and prejudicial to the interests of revenue and issued show cause notice for revision of the order u/s. 263 of the Act. After considering the submissions of the assessee, the ld. CIT(TP) held

the order of the TPO as erroneous insofar as it is prejudicial to the interests of revenue and set aside the order of the TPO with a direction to pass fresh order in the light of his findings by observing as under:-

> "32. Accordingly, in line with the principles laid down in the above mentioned rulings which clearly apply to the facts and circumstances of this case and for the reasons detailed in the foregoing paragraphs, I hold that the order u/s. 92CA(3) of the Act dated 28.01.2021 is erroneous and prejudicial to the interests of revenue. Accordingly, the said order is set aside on the above two issues of (a) share-based compensation in the form of ESOP cost, depreciation and amortization in the Operating Expense base computation along with correct segmental allocation thereof and (b) Delivery charges and warranty expenses in AMP expenditure computation along with correct segmental allocation thereof and the TPO is directed to pass the order for AY 2017-18 in the light of above findings by carrying out necessary inquiries/verification under the TP provisions after giving sufficient opportunity of being heard to the assessee."

4. Aggrieved, the assessee is in appeal before the Tribunal.

5. The ld. AR filed written synopsis which is as under:-

9. The appellant is a private limited company, engaged in the business of operating Amazon.in marketplace and partners with sellers who offer products to buyers on the said store. The appellant, inter alia, also offers services such as warehousing, logistics, order fulfilment and other services to sellers to sell various products via Amazon.in Store.

10. During the previous year relevant to assessment year 2017-18, the appellant filed return of income on 30.11.2017 declaring total loss of Rs.4,522.69 crores. Subsequently, the appellant's case was selected for scrutiny and reference was made to the TPO for determination of arm's length price of international transaction(s).

11. In the impugned revisionary proceedings, the CIT(TP) sought to revise the transfer pricing order dated 28.01.2021, passed under section 92CA(3) of the Act, on the alleged ground that the TPO had erroneously computed TP adjustments by:

(a) considering SBC in the form of ESOP and depreciation and amortization expense, to be in the nature of non-operating expense whilst computing operating cost of Marketing Support Service Segment (**MSS Segment**); and
(b) excluding delivery charges and warranty expenses from **AMP Expenses**,

without making necessary/proper enquiries and verification.

12. It is submitted that in the transfer pricing report for the relevant assessment year 2017-18, the segmental operating margin of the appellant for **MSS Segment** was determined at 14.86% by considering **total operating cost at Rs.7,103.14 million**, after inter-alia excluding SBC cost of Rs.27 million. Refer **page 262** of the paperbook.

13. In the present case, CIT(TP) has sought to invoke revisionary jurisdiction qua **MSS** Segment and inter-alia contended that SBC in the form of ESOP was erroneously considered as non-operating expense by the TPO.

14. It is at the outset submitted that SBC / ESOP attributable to MSS Segment amounted to INR 27 million only as against INR 1,760 million erroneously considered by the CIT(TP). Furter, the CIT(TP) has failed to appreciate that since the aforesaid expense was **notional and non-operating in nature**, the same was excluded from operating cost for the purpose of computation of segmental operating profit/margin for the relevant year.

15. Further, the CIT(TP) failed to appreciate that the appellant as well as the TPO, while computing operating margin had already considered the expenditure on account of depreciation and amortization as operating expenditure **[Depreciation – Rs.1,365.30 million (attributable to MSS segment - Rs.2.46 million); Amortization of intangible assets – Rs. 1,281.33 million (attributable to MSS segment - Rs.0.59 million)]** and the same stood included in the operating cost base for purposes of computing operating margin. [Refer **page 262 of PB and pages 5 to 7 of the TP Order**].

16. Insofar as AMP expense, it is submitted that expenditure on account of warranty and delivery costs being incurred only **post conclusion of the sale transaction** and in no way related to promotion of Amazon brand and therefore did not warrant inclusion in the AMP expenditure (*discussed in detail infra).*

Re: TPO made enquiries and applied mind - order not erroneous

17. **It is emphatically submitted that the TPO, in the course of original transfer pricing proceedings for the assessment year 2017-18, was not only conscious/ aware of the aforesaid issues but also conducted**

extensive/ necessary enquiries/ investigations, as required in law, therein before accepting the same, as would be evident from the details of enquiries conducted.

18. In this connection, the appellant is providing herein below details of relevant queries raised by the TPO vide notices/questionnaire and information/ replies filed by the appellant in response thereto from time to time, which clearly establishes that the TP order dated 28.01.2021 was passed after due examination and verification of the information/ documents submitted during the course of assessment proceedings:

Particulars of notice/reply	Summary of information sought/filed before the TPO
Notice dated 06.01.2020 [Copy enclosed at **pages 29 to 30** of paperbook]	The TPO vide the said notice, required the appellant to produce all documents relied upon in support of computation made to determine the arm's length price of the international transactions. The relevant extracts of the notice is re-produced hereunder: *"a. Complete set of audited final accounts and auditor's report.* *b. Copies of information and documents maintained under section 92D(1) of Income-tax Act read with rules10D(1)and (3)of Income-tax Rules, along with a copy of transfer pricing study report.* *c. Copies of orders of CIT (Appeals) and ITAT for earlier years involving adjudication of transfer pricing issues.* *d. Copies of relevant agreements in respect of international transactions.* *e. Copy of FormNo.3CEB.* *f. Copy of TPO's order for the last assessment year* …….. *k.* ***Details of all international transactions along with segment-wise break- up of such transactions****.* …… *p.* ***Fact sheet showing business description, total turnover, Gross Operating Net profit, Method applied, value of International Transaction, PLI etc. of three year including the relevant year****"*
Reply dated 17.01.2020	In response to notice dated 06.01.2020, the appellant vide reply dated 17.01.2020, submitted all the requested information/ documents, inter alia, enclosing: - Audited Financial accounts and auditors report (@ ***Pg. 35 – 85 of the PB. SBC @ pg. 63,67 of the PB***)

[Copy enclosed at **pages 31 to 222** of paperbook]	- Transfer Pricing Study (***@ Pg. 86 – 166 of the PB***) - Inter-company agreements, as amended, on sample basis, providing for **specific exclusion of 'cost of equity compensation'** for computation of service fee and foreign exchange expense entered into by the appellant with: (a) Bladen, Inc. (United States of America) (***Pg. 167 of the PB @ relevant at 177***) (b) NV Services, Inc. (United States of America) (***Pg. 179 of the PB @ relevant at 188***) (c) Amazon Data Services Ireland Limited (Ireland) (***Pg. 190 of the PB @ relevant at 198***) - Form 3CEB ***(Pgs. 200 to 219 of the PB)*** - Computation of total income (***Pgs. 220 to 222 of the PB***)
SCN dated 20.12.2020 [Copy enclosed at **pages 223 to 256** of paperbook]	Vide show cause notice ('SCN'), the TPO required the appellant to, inter alia, furnish following details: **(a) Details of unallocated cost** ***(@Pg 226 of the PB)*** **(b) Warranty expenses amounting to Rs.91 million and delivery costs amounting to Rs.15,095 million** ***(@Pg 250 - 251 of the PB)***
Reply dated 11.01.2021 [Copy enclosed at **pages 257 to 307** of paperbook]	**In response to the aforesaid query, the appellant filed elaborate reply justifying, inter alia:** **(a) Break-up of segmented financials, inter alia, providing details of: (i) share based compensation, (ii) Warranty expenses; (iii) delivery charges (iv) Amortization of intangible assets; (v) Depreciation of tangible assets (@*Pg. 261 – 262 of the PB)*** **(b) Delivery expenses incurred for the marketplace segment, unrelated to brand promotion (@*Pg. 273 – 278 of the PB)*** **(c) Warranty expenses related to the Wholesale segment (@*Pg. 273 – 278 of the PB)***
28.01.2021	The TPO passed order under section 92CA(3), duly accepting the aforesaid information filed by the appellant.

19. On perusal of the aforesaid, it will kindly be appreciated that the TPO made extensive/ necessary enquiries to verify and examine the operating cost and

AMP ***expense*** as reported by the appellant in so far as pointed queries were raised qua:

(a) Justification in respect of unallocated costs, which included SBC/ESOPs, depreciation and amortizations expenses;

(b) Justification for not including delivery and warranty expenses as part of AMP expenditure.

20. It is evident from the above that specific queries were raised by the TPO during course of assessment and detailed explanations were filed by the appellant in response thereto, on consideration of which the operating cost as reported by the appellant was accepted and no adverse inference was drawn by the TPO.

21. In so far as AMP expense too, it may be pertinent to note that the TPO raised specific query vide SCN directing the appellant to justify why delivery and warranty expense should not be included as part of AMP Expense. However, on considering the detailed response dated 11.01.2021 filed by the appellant, the same was not considered relevant for inclusion in the AMP Expense by the TPO and adjustment was made only qua advertisement and promotion expenses in the TP order dated 28.01.2021 (Refer page 50 of TP order).

22. In the impugned revisionary order, the CIT(TP) though categorically accepted the fact that specific query was raised by the TPO qua delivery and warranty expense, but has referred to para 13 of the TPO order dated 28.1.2021 to contend, merely on the basis of presumption, that the entire submission dated 11.01.2021 filed by the appellant was rejected by the TPO, which included the issue of delivery and warranty expense as well. However, the CIT(TP) failed to appreciate that the submissions, to the extent not accepted/rejected by the TPO was specifically dealt with in the TP Order by providing specific reasons for the rejection and nowhere in the order has the TPO stated that the entire submission of the appellant stands rejected. The same is also evident from the TP order, wherein the TPO has observed as under:

"The submissions of the assessee have been carefully considered. However, the same ***cannot be accepted for the following reasons****: …*
Further, the objections raised by the tax payer in the submission vide letter dated 11.01.2021 ***are considered and disposed as under****:"*(emphasis supplied)

23. In this regard, it is submitted that once all the relevant details/ documents are available on record and the issue is specifically raised and considered

by the concerned officer, in such circumstances, it is not open to the CIT to exercise revisionary jurisdiction, unless the TPO is found to have failed to make inquiries/ verification, which should have been made as per law but were not made; simply because the CIT(TP) differs with the manner of the inquiries/ investigation, revisionary jurisdiction cannot be exercised.

24. Reliance in this regard is placed on the following decisions, wherein it has been held that even though the assessment order was silent with respect to the issues raised in the 263 order, that by itself did not vest the Commissioner with valid jurisdiction, considering that such issues were considered by the assessing officer and formed part of the assessment record:
    - Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)
    - CIT vs. Eicher Limited: 294 ITR 310 (Del) – confirmed in CIT vs. Kelvinator of India Ltd.: 320 ITR 561 (SC)
    - CIT vs. Anil Kumar Sharma: 335 ITR 83 (Del)
    - CIT v. Sunbeam Auto Ltd.: 332 ITR 167 (Del)
    - CIT v. Vikas Polymers: 341 ITR 537 (Del.)
    - CIT vs. Vodafone Essar: 212 Taxman 184 (Del.)
    - CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Bom.)
    - CIT v. Hindustan Lever Ltd: 343 ITR 161 (Bom.)
    - CIT v. Goyal Private Family Specific Trust: 171 ITR 698 (All)
    - CIT v. Ganpat Ram Bishnoi: 296 ITR 292 (Raj)
    - CIT vs. Girdhari Lal: 258 ITR 331 (Raj.)
    - Paul Mathew and Sons v. CIT 263 ITR 101 (Ker.)
    - CIT v. Arvind Jewellers: 259 ITR 502 (Guj.)
    - CIT v. Ratlam Coal Ash Co. 171 ITR 141 (MP)
25. As a necessary corollary, when on a particular issue the TPO conducted extensive enquires during the course of proceedings, such order cannot, it is submitted, be regarded as erroneous so as to warrant exercise of revisionary jurisdiction under section 263 of the Act.

Issue squarely covered by order of Tribunal in case of Group Concern

26. Specific reliance in this regard is placed on the recent decision of the Bangalore Tribunal in the case of **Amazon Development Centre (India) Pvt Ltd in IT(TP)A No. 417/Bang/ 2023, order dated 25.10.2023**, group concern of the appellant, wherein revisionary jurisdiction invoked under section 263 of the Act by the CIT(TP) (*same incumbent as in the case of the appellant*) on almost similar facts, was quashed by the Tribunal by observing as under:
    "*8. After considering the rival submissions, we note that the ld. CIT has exercised is power as per section 263 and observed that the TPO has wrongly calculated the total operating expenses ignoring the ESOP*

expenses issued by the parent company to the employees of the subsidiary company and debited expenses to the P&L account of Rs.4,054 million. He further noted that the foreign exchange fluctuation loss of Rs.110 million and loss on investment in subsidiaries of Rs.118 million was to be treated as operating expenses. However, the TPO has not treated these as operating expenditure and accepted the TP study of the assessee. ***We note that the TPO has issued show cause notice to the assessee and the assessee has duly replied. Copy of notices and reply are placed in the PB which were referred to by the ld. AR during the course of hearing. The ld. AR submitted that as per the disclosure policy, ESOP expenses are required to be disclosed as per the requirement of Ind-AS 102, therefore it was debited to P&L account by the assessee. While calculating the taxable income of the assessee, it has been added back to the total income as per computation filed by the assessee****. We have gone through the judgments relied on by the ld. AR in this regard noted supra where it is held that ESOP expenditure is not to be treated as operating expenditure. Therefore, respectfully following the above judgment, we hold that ESOP expenses is non-operating expenditure for the purpose of computation of operating margin. Accordingly, the ld. CIT is not justified in treating it as operating expenses*." (Emphasis supplied)

Copy of the aforesaid order is enclosed as **Annexure-1**.

27. It is thus reiterated that once, on the facts of the case, not only the relevant details/ documents are available on record and the issues were specifically raised and considered by the TPO, in such circumstances, it is not open to the CIT(TP) to exercise revisionary jurisdiction, unless the TPO is found to have failed to make inquiries/ verification, which should have been made as per law but were not made. The CIT cannot, merely on difference of opinion with regard to the manner of the inquiries/ investigation, exercise revisionary jurisdiction.

28. In the aforesaid circumstance, it is submitted that the summarily setting aside of the TP Order by the CIT(TP), without any reasoning is wholly unjustified and without jurisdiction.

Plausible view in law – Order not erroneous

29. On perusal of the above, it is submitted that apart from the fact that there was no error whatsoever, in the TP order, the view adopted therein was, in any case, a plausible view and thereby no interference is called for in terms of section 263 of the Act.

30. It has consistently been held by the Courts that if the assessing officer (in this case, TPO) has adopted one of the courses permissible in law which

has resulted in loss of revenue, or where two views are possible and the assessing officer (in this case, TPO) has taken one view with which the Commissioner does not agree, the exercise of revisionary power under section 263 of the Act would be without jurisdiction.

31. Reference, in this regard, may be made to the following decisions:
- Malabar Industrial Co. Ltd: 243 ITR 83 (SC)
- CIT vs. Max India Limited: 268 ITR 128 (P&H) [affirmed by SC in 295 ITR 282 (SC)]
- CIT V. Gabriel India Limited: 203 ITR 108 (Bom)
- CIT V. Ganpat Ram Bishnoi: 198 CTR 546/ 152 Taxman 242 (Raj.)
- Paul Mathew & Sons v. CIT: 263 ITR 101 (Ker.)
- Vimgi Investment (P) Limited: 290 ITR 505 (Del.)
- CIT V. Mepco Industries Limited: 294 ITR 121 (Mad.)

32. In the present case, it is submitted that: (i) SBC cost, being notional in nature was rightly treated as non-operating expenses; (ii) Depreciation and amortisation cost was already included as part of operating cost base; and (iii) Delivery and Warranty expenses, being post sales expense, did not warrant inclusion in AMP expenditure.

33. Each of the aforesaid is explained hereunder:

Re: (i)SBC / ESOP cost to be excluded from operating expenses

34. It is at the outset submitted that treatment of SBC/ESOP cost as non-operating expense for the purpose of computation of operating margin has recently been upheld by the Bangalore Tribunal in the case of **Amazon Development Centre (India) Pvt Ltd in IT(TP)A No. 417/Bang/ 2023, order dated 25.10.2023**, a group concern of the appellant, wherein similar revisionary jurisdiction invoked under section 263 of the Act to inter-alia include SBC/ESOP cost as part of operating expense was quashed by the Tribunal by observing as under:

> "*8……. We have gone through the judgments relied on by the ld. AR in this regard noted supra where it is held that ESOP expenditure is not to be treated as operating expenditure. Therefore, respectfully following the above judgment,* ***we hold that ESOP expenses is non-operating expenditure for the purpose of computation of operating margin. Accordingly, the ld. CIT is not justified in treating it as operating expenses***." (Emphasis supplied)

35. To the same effect are the following cases, where ESOP cost has been held to be in the nature of non-operating expense for the purpose of computation

of operating margin:

- VMWARE Software India Pvt Ltd. v. DCIT: IT(TP) A No.276/Bang/2023, order dated 20.09.2023
- i2 Technologies Software (P.) Ltd v. CIT(A): 83 taxmann.com 143 (Bang – Trib.)
- HOV Services Ltd v. JCIT: 73 taxmann.com 311 (Pune – Trib.)

36. In the present case, it may be noted that the appellant's ultimate parent company, Amazon.com, Inc. ("**Amazon US**") grants RSUs to select employees that vest at a specific future date. In terms of the agreement between the appellant and Amazon US, the appellant is not required to discharge any payments qua the awards given to the employees of the appellant. Therefore, it is submitted that the RSU cost is a notional cost in the appellants statement of profit and loss account; and in order to meet the requirements of Ind-AS 102 the same has been recorded in the financial statements. Further, it is also pertinent to mention that the appellant has not claimed the aforesaid expense as admissible expenditure in the return of income (*both for normal as well as MAT computation*).

37. It may also be pertinent to note that relevant inter-company agreements were also filed by the appellant vide letter dated 20.01.202, wherein SBC cost has been specifically excluded from cost, which were duly examined by the TPO and thus the allegation of the CIT(TP) that the TPO failed to examine agreements is factually incorrect.

Re: (ii) Depreciation and Amortization cost as part of cost base

38. The observation made by the CIT(TP) is factually incorrect inasmuch as the appellant as well as the TPO, while computing the operating margin in the MSS segment has considered the expenditure on account of depreciation/ amortization as operating expenditure and the same has been included in the operating cost base for the purpose of computing the operating margins [Refer **page 262 of PB and pages 5 to 7 of the TP Order**].

39. It may also be pertinent to note that the operating margin of the appellant in respect of MSS segment has been determined at 14.86% (Refer **TP study @ page 165 of PB**) after including depreciation and amortization as part of the cost base, which has been accepted to be at arms' length by the TPO, being within +/- 3% of the average PLI of the comparable considered (see page **28 of the TP order – pg 55 of appeal set**). Thus, even if for the sake of argument, though which is not the case as explained above, depreciation and amortization expense (aggregating to Rs.3 million) is not considered as part of cost base, as aforementioned, it would still fall within the permissible range of +/-3. Given the above, the order of the TPO is not erroneous much less prejudicial to the interest of the Revenue.

40. That apart, it is also critical to note that the aforesaid fact was also disclosed to the TPO vide response dated 11.01.2021 ***(relevant @ Pg 261 – 262 of the PB***). Thereafter, the same was also reiterated to CIT(TP) vide response date 10.03.2023 (***relevant @ Pg 8-9 of the PB***)

Re: (iii) Delivery and Warranty expenses, not part of AMP expenses

41. It is submitted that during the course of proceedings, the TPO issued SCN dated 20.12.2020 seeking to make transfer pricing adjustment on account of AMP expenses. For the purpose of computing the adjustment, the TPO sought to include warranty expenses amounting to Rs.91 million and delivery costs amounting to Rs.15,095 million as part of AMP expenses.

42. In response to the SCN, the appellant vide response dated 11.01.2021, duly submitted before the TPO that the aforesaid expenditure on account of warranty and delivery costs is incurred only when sales are concluded and therefore, the same cannot be regarded as part of AMP expenditure incurred for the purpose of development of brand.

43. Upon analysing the appellant's response, the TPO agreed that the expenditure incurred on account of warranty and delivery costs do not warrant inclusion in AMP expenses in the TP order dated 28.01.2021 passed under section 92CA(3) of the Act.

44. In other words, vide SCN dated 20.12.2020, the TPO initially sought to include the expenditure on account of warranty and delivery costs as part of AMP expenses and it is only on considering the response filed by the appellant, the TPO agreed with the position of non-inclusion adopted by the appellant.

45. In view of the aforesaid facts, the CIT was not justified in holding that the TPO has not conducted necessary inquiries or verification since pointed query was raised by the TPO on this very specific issue, which was duly responded by the appellant and only after considering the same, warranty and delivery costs was excluded from the ambit of AMP expenses in the TP order. Being so, the order passed by TPO cannot be treated as erroneous on this account.

46. Even otherwise, expenditure on account of warranty and delivery costs cannot be regarded as having been incurred for the purpose of development of brand. The said expenditure is not incurred for publicity or promotion of brand and at best can be regarded as having been incurred after effecting the sales of goods.

47. Reliance in this regard is placed on the decision of the Delhi High Court in the case of **Sony Ericson Mobile communication India Pvt. Ltd. v. CIT: 374 ITR 118 (Del.)**, wherein the Hon'ble Delhi High Court held that selling expenses are not in the nature and character of 'brand promotion' and thus cannot be construed as part of AMP expense. Relevant observation of the Court is extracted as under:

"176. The aforesaid argument, when AMP expenses are segregated from the composite transaction including distribution and marketing function, is flawed and has to be rejected. The respondent-appellants engaged in distribution and marketing of consumer goods. Distribution and marketing exercise in case of tangibles requires transfer/sale of goods to third parties, be it sub-distributors or retailers. ***The said transaction is in the nature of sale of goods for consideration. The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of 'brand promotion' They are not directly or immediately related to 'brand building' exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building connect is too remote and faint. To include and treat the direct marketing expenses like trade or volume discount or incentive as 'brand building' exercise would be contrary to common sense and would be highly exaggerated. These reduce the net profit margin. It would lead to abnormal financial results defying accountancy practices and commercial and business sense. The expenses being in the nature of selling expenses have an immediate connect with price/consideration payable for the goods sold. They are not incurred for publicity or advertisement. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses.*"(emphasis supplied)

48. Similarly, in the case of **Glaxo Smithkline Consumer Healthcare Pvt Ltd.: ITA No. 1148/Chd/2011 (Chd. Trib.)**, the Chandigarh Tribunal held that selling expenses cannot be considered as having been incurred for the purpose of promotion of brand. Relevant extract of the judgement is reproduced as under:

"29. We find that the special bench of the Tribunal (Majority view) in M/s L.G. Electronics India (P) Ltd Vs ACIT (supra) held that the expenses in connection with the sales do not lead to brand promotion and thus cannot be brought within the ambit of advertisement, marketing and promotion expenses for determining the cost/ value of the international transaction. In view thereof, ***we direct the assessing officer to exclude the expenses***

incurred by the assessee in connection with the sales totalling Rs.5500.86 Lacs as the same do not fall within the ambit of AMP expenses and hence not to be considered for computing cost/ value of international transaction*."* (Emphasis supplied)

49. To the same effect is the decision of the Delhi Tribunal in the case of **Haier Appliances India Pvt. Ltd.: ITA No 1515/Del/2014 (Del. Trib.)** wherein the Tribunal held that selling expenses cannot be regarded as having been incurred for development of brand. The decision of the Tribunal was approved by the **Delhi High Court vide decision dated 30.07.2019 in ITA No. 709/2019**.

50. Reliance is also placed in this regard on the following decisions where the Benches of the Tribunal have directed for the exclusion of selling expenses from the ambit of AMP expenses:

- Stanley Black & Decker India Pvt. Ltd. (TS-89-ITAT-2016 (Bang)
- Panasonic Consumer India Pvt. Ltd. (TS-338-ITAT-2015(DEL)-TP)
- Yamaha Motor India Sales Pvt. Ltd. (TS-162-ITAT-2014(DEL)-TP)
- RayBan Sun Optics India Ltd. (TS-122-ITAT-2014(DEL)-TP)
- Perfetti Van Melle India Pvt. Ltd. (TS-119-ITAT-2014(DEL)-TP)
- LG Electronics India Pvt. Ltd. Vs. ACIT (TS-11-ITAT-2013(DEL)-TP)

51. In the case of the appellant, it is respectfully submitted that the TPO accepted the claims of the appellant only after examining the issue thoroughly and considering the legal position as submitted by the appellant vide reply dated 11.01.2021, filed during the course of assessment.

Re: Lack of enquiry vs. Inadequate Enquiry

52. It is well settled law that if the concerned officer (in this case TPO), acting in accordance with law makes an assessment, the same could not be regarded as erroneous, simply because according to CIT more enquiries should have been conducted by such officer or the order should have been written more elaborately. In other words, jurisdiction under section 263 of the Act cannot be invoked for making further enquiries or to go into the process of assessment again and again, merely on the basis that more enquiries ought to have been conducted to find something.

53. There is, it is respectfully submitted, distinction between "lack of enquiry" and "inadequate enquiry". While in the former case, the assessment order may be regarded as "erroneous", but that would not be so in the latter case where enquiry had actually been conducted by the concerned officer, even though the CIT(TP) may not agree with the nature and manner of

conducting enquires.

54. As a necessary corollary, when on a particular issue the TPO conducted certain enquires during the course of proceedings, such order cannot, it is submitted, be regarded as erroneous so as to exercise revisionary jurisdiction under section 263 of the Act.

55. In simple words, where an issue has been examined by the TPO, the CIT(TP) cannot set aside the assessment merely because according to the CIT(TP) enquiries should have been conducted in a particular manner and/ or further enquiries ought to have been conducted by the TPO. CIT(TP) cannot substitute his opinion in place of that of the TPO as to the manner and the form in which the enquiries should have been conducted during the course of assessment.
    - CIT vs. Sunbeam Auto Ltd: 332 ITR 167 (Del)
    - CIT v. International Travel House: 344 ITR 554 (Del)
    - CIT vs. Vikas Polymers: 341 ITR 537 (Del)
    - Gulmohar Finances Limited: 170 Taxman 483 (Del.)
    - Fab India Overseas vs. CIT: 244 CTR 380 (Del.)
    - CIT vs. Vodafone Essar: 212 Taxman 184 (Del.)
    - CIT vs. DLF Ltd.: 350 ITR 555 (Del)
    - CIT v. Ratlam Coal Ash Co: 171 ITR 141 (MP)
    - CIT vs. Ganpat Ram Bishonoi: 152 Taxman 242 (Raj.)
    - CIT vs. Mehrotra Brothers : 270 ITR 157 (MP)
    - CIT vs. Associated Food Profits (P) Ltd. : 280 ITR 377 (MP)
    - CIT vs. Development Credit Bank Ltd: 323 ITR 206 (Bom.)

56. The case of the appellant stands on a much better footing since complete and detailed enquiries were made in the case of the appellant as elaborated supra and there was due examination and application of mind on part of the TPO which also stands recorded in the TP Order. Further, the view taken by the TPO is a plausible view as demonstrated above.

57. It is respectfully submitted that, in the aforesaid circumstances, the TP order dated 28.01.2021 for the assessment year 2017-18, is neither `erroneous' nor `prejudicial to the interests of the Revenue warranting exercise of revisionary jurisdiction under section 263 of the Act.

Re (c): Explanation 2 to section 263 relied upon by CIT(TP)

58. In the impugned order passed under section 263 of the Act, the CIT(TP) has harped upon Explanation 2 to section 263 of the Act to hold that non-conduct of proper enquiry by the TPO renders the order erroneous and prejudicial to the interest of the Revenue.

59. In this regard, it is submitted that the aforesaid Explanation cannot, in our respectful submission, be read to provide unfettered powers to the CIT to set aside an assessment order, on a paltry ground of insufficient enquiry being conducted by the TPO, at his whims and fancies**.**

60. Even after insertion of the aforesaid Explanation, the CIT, would, in our respectful submission, need to point out failure on the part of the TPO in not conducting relevant enquiries which were critical for decision on an issue, before branding the assessment order to be erroneous and prejudicial to the interest of the Revenue. Any failure on the part of the TPO in conducting an enquiry would not, in our respectful submission, validate assumption of jurisdiction by the CIT under section 263 of the Act, in accordance with the consistent view of the Courts referred supra, unless the CIT can demonstrate that the enquiries or verification conducted by the TPO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer.

61. Reliance is placed on the following decisions, wherein it has been held that Explanation 2 to section 263 of the Act does not authorize or give unfettered powers to CIT to revisit each and every order:

- PCIT vs. Shreeji Prints Pvt. Ltd.: TA No. 828 of 2019 (Guj)
- PCIT vs. Harikrishan S Virmani: ITA No. 164 of 2019 (Guj)
- Bagrrys India Ltd., v. Pr.CIT: ITA No.3785 of 3018 (Del)
- M/s Arun Kumar Garg HUF vs. Pr.CIT (ITA No. 3391/Del/2018 (Del)
- Pr. CIT vs. Indian Farmers & Fertilizers Co-operative Ltd.: ITA No. 597/2017 (Del)
- Amira Enterprises Ltd vs PCIT in ITA No 3206/Del/2017 dated 29/11/2017 (Del)
- Narayan Tatu Rane v. ITO: [2016] 70 taxmann.com 227 (Mum)
- Shree Bhagawati Enterprises vs. PCIT: ITA No. 525 of 2016 (Mum)
- Torrent Pharmaceuticals Ltd vs. DCIT: ITA No.164 of 2018 (Ahd.)
- Shri Narasimha Reddy Peechu v. ITO: ITA No. 932 of 2017

62. In the light of the aforesaid settled legal position, it is the respectful submission of the appellant that the impugned order under section 263 of the Act is without jurisdiction and bad in law, since the pre-requisite twin conditions for invoking jurisdiction under the said section have not been fulfilled in as much as the order dated 28.01.2021, issued by the TPO under section 92CA(3) of the Act is neither erroneous nor prejudicial to the interests of the Revenue.

Re: CIT(TP) to record prima facie finding on merits before setting aside the assessment:

63. That apart, it is further submitted that the CIT(TP) has in the revisionary order, merely set aside the assessment order on the alleged ground that the TPO had incorrectly computed AMP adjustment and also excluded certain expenses as non-operating for MSS segment without making necessary/proper enquiries and verification. The CIT(TP) has, however, not pointed out the error, if any, much less the prejudice caused to the interests of Revenue as a consequence of alleged non-verification, while setting aside the assessment. The CIT(TP) has not, before setting aside the assessment on the said issue, recorded any prima facie finding on the merits thereof.

64. The Courts have in the undermentioned decisions held that the CIT while exercising revisionary powers under section 263 of the Act and setting aside the assessment order, is required to record prima-facie finding on the merits of the matter after conducting necessary enquiry(ies) and is not empowered to blanketly set aside the assessment order on the ground that sufficient enquiries were not conducted by the assessing officer:
    - ITO v. DG Housing Projects Ltd.:343 ITR 329 (Del.)
    - DIT v. Jyoti Foundation: 357 ITR 388 (Del.)
    - CIT v. Delhi Airport Metro Express (P) Ltd.: ITA No. 705/2017 (dated 5.9.2017);
    - CIT v. Modicare Ltd.: 759/2016 (dated 20.9.2017)
    - CIT v. Prithvi Raj And Co.: 199 ITR 424 (Del)
    - CIT v. O. P. Seth: 201 ITR 635 (Del)
    - CIT, Mysore v. T. Narayana Pai: 98 ITR 422 (Kar)
    - J.P.Srivastava And Sons (Kanpur) Ltd. v. CIT, UP: 111 ITR 326 (All)
    - S.B.Sankar v. State of Kerala and Another: 171 ITR 689 (All)
    - CIT v. Kanda Rice Mills: 178 ITR 446 (P&H)
    - CIT, Patiala v. Chawla Trunk House: 139 ITR 182 (P&H)

65. In the facts of the present case, the CIT(TP) has merely set aside the transfer pricing order passed by the TPO. The CIT(TP) has not even carried out minimal enquiries to allege that claim of appellant is not acceptable. That apart, it is not even suggested/ explained by the CIT(TP) as to what more enquiries was the TPO is required to make prior to accepting the claim of the appellant.

Order under section 92CA(3) of the Act passed on 28.01.2021 –amendment under section 263 applicable only from 01.04.2022

66. The Finance Act, 2022 amended section 263 of the Act to include within its ambit, orders passed under section 92CA of the Act. The said amendment was inserted in the statute w.e.f. 01.04.2022.

67. In the present case, the TPO has passed the order under section 92CA(3) of the Act, at the time when the statute did not permit exercise of revisionary jurisdiction qua orders passed by the TPO under section 92CA of the Act [Refer: **JCB India Ltd [TS-26-ITAT-2022(DEL)-TP]**.

68. The legislature, it is submitted has consciously considered the application of the law to be prospective in nature and thus it follows logically that only orders passed by the TPO, after the date in this regard, i.e., 01.04.2022 would be amenable to revisionary jurisdiction of CIT(TP); this is so because the CIT(TP) could only take cognizance of orders passed under section 92CA after the date in this effect, i.e., 01.04.2022. Any interpretation contrary to the aforementioned position would lead to giving retrospective effect to the amendment in section 263 of the Act, which the legislature consciously chose to not adapt.

69. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of **Estate Duty v. M.A. Merchant: 177 ITR 490 (SC)**, wherein the Court observed as under:
"*As it stands, there are no specific words either which confer retrospective effect to section 59.* ***To spell out retrospectivity in section 59, then, there must be something in the intent of section 59 from which retrospective operation can be necessarily inferred. We are unable to see such intent****. The new section 59 is altogether different from the old section 62 and there is nothing in the new section 59 from which an intent to give retrospective effect to it can be concluded.*

*6……****There is a well settled principle against interference with vested rights by subsequent legislation unless the legislation has been made retrospective expressly or by necessary implication. If an assessment has already been made and completed, the assessee cannot be subjected to reassessment unless the statute permits that to be done.*** *Reference may be made to CED v. Smt. Ila Das [1981] 132 ITR 720 (Cal.) where an attempt to reopen the estate duty assessment consequent upon the insertion of the new section 59 was held infructuous.*

7. We hold that section 59 is not retrospective in operation and that the reopening of the assessment under section 59 is bad in law.*"(emphasis supplied)*

70. Therefore, it is submitted that on this ground too, the impugned order needs to be quashed as void ab initio, passed wholly without jurisdiction.

Re: Assessment order passed under supervision of Pr.CIT

71. It is submitted that where the TP Order is passed under the supervision and with the approval of the Pr.CIT, it is not open to the CIT(TP) to revise such an order in terms of section 263 of the Act. In other words, a Commissioner of co-ordinate/ lower rank, cannot sit in judgment to determine whether the order passed by the assessing officer/TPO after incorporating directions of the Pr.CIT, is erroneous and prejudicial to the interest of the Revenue.

72. Support in this regard is drawn from the following decisions wherein it has been held that where the assessment order was passed with the approval of CIT such an order was not amendable to revisionary jurisdiction under section 263 of the Act:
- Hari Iron Trading Co. vs. CIT: 263 ITR 437 (P&H)
- CIT v. Hastings Properties: 253 ITR 124 (Cal.)
- Festo Elgi (P) Limited v. CIT: 246 ITR 705 (Mad.)
- Orient (Goa) Ltd. v. DCIT: 66 ITD 479 (Pune Trib.)
- J.R. Agarwal v. ACIT: 67 TTJ 72 (Pune Trib.)

73. In view of the above, it is submitted that once an order is passed under the monitoring of the Commissioner, the successor Commissioner cannot set aside the assessment on the ground that the assessment order was passed without application of mind."

6. The ld. DR relied on the orders of the lower authorities and he has also filed written synopsis. He submitted that the after insertion of Explanation 2 in sub-section (1) of section 263, the CIT has wide power. The amendment made in section 263 by adding the words [or the Transfer Pricing Officer, as the case may be] by the Finance Act, 2022 w.e.f. 01.04.2022 is administrative amendment and is applicable with effect from when it was brought in the statue book, accordingly, the CIT had power to exercise under section 263 on the order passed by the TPO, therefore the jurisdictional issue raised by the ld. AR is failed. The ld. DR has filed written synopsis which is placed on record.

7. After considering the rival submissions and perusing the material on record, we note that in regard to first issue for excluding the SBC as non-operating cost while calculating the OP/OC. This issue is covered in favour of the assessee in its group company as relied by the ld. AR of the assessee noted supra in the case of Amazon Development Centre(India) Pvt. Ltd. in IT(TP)A No. 417/Bang/2023 order dated 25.10.2023 and the other case law relied by the ld. AR of the assessee supports the case of the assessee. In the case cited above the similar issue has been decided by the co-ordinate bench in the proceeding initiated by the ld. CIT u/s 263 in favour of the assessee. In view of this, respectfully following the above judgment we hold that this issue is in favour of the assessee.

8. Further in respect of issue No.2, as observed by the CIT(TP) that while calculating OP/OC by the TPO, the depreciation and amortization expenses of Rs.3 million have been excluded by the TPO from the operating cost. We note from the TPO order para 3, the total revenue has been considered of Rs.8159 million and total cost has been calculated of Rs.7130 million resultantly there is operating profit of Rs.1029 million. Accordingly, the OP/OC of the assessee has been calculated by the TPO at 14.43% and comparable mean margin adopted by the TPO is 15.88%. Accordingly the TPO noted that the taxpayer's margin is within the range of +/- 3% and no adjustment was suggested in the market support service segment. However, the ld. CIT(TP) noted that depreciation and amortization expenses of Rs. 3 million should be part of the operating cost. We further note from the

PB filed at page no.165 the assessee has shown revenue from operations of Rs.8053 million and total operating cost has been considered at Rs.7011 million resultantly there is operating profit of 1042 million. According the margin (OP/TC) has been calculated at 14.86%. Accordingly, we note that there is difference between revenue from operations and operating cost reported by the assessee and calculated by the TPO and no reconciliation is produced for the difference is produced before us. Therefore, we hold that the ld. CIT(TP) has rightly exercised his jurisdiction on this issue. We further observe from the submissions made by the ld. AR of the assessee even if ld. CIT(TP) has rightly exercised his jurisdiction on this issue, there will be futile exercise because the operating margin of the assessee will be within the +/-3% range as prescribed in the provisions. We find substance in the submission of the ld. AR of the assessee, After including the depreciation and amortization expenses as operating cost, the margin of the assessee still will remain the range of +/- 3% and no addition is called for. Therefore, there is no erroneous and prejudicial order passed by the TPO on this issue. Accordingly, the assessee succeeds on this issue.

9. Issue No.3 : Delivery and warranty expenses not part of AMP expenses. Considering the rival submissions, we note that the TPO had issued notice dated 26.12.2020 seeking to make adjustment to include warranty expenses amounting 0.91 million and delivery cost amounting to Rs.15,095 million as part of AMP expenses. The assessee duly replied on 11.1.2021 and submitted that the delivery cost

and warranty expenses is incurred only when sales are concluded therefore the same cannot be part of AMP expenditure incurred for the purpose of development of brand. The TPO agreed and did not make any adjustment. As per the ld. CIT(TP), these two expenses are part of the AMP expenditure. We note that during the course of TP proceedings, the TPO had made detailed enquiry on these issues and it was not considered as part of AMP expenditure. After going through the detailed submissions and case law relied by the ld. AR of the assessee these expenditure cannot be regarded as having been incurred for the purpose of development of brand since these are post sales activities and part of sales expenditure. It is also not a case of lack of enquiry. Considering the entire facts, we hold that the delivery cost and warranty expenses are not part of AMP expenditure. Therefore, the ld. CIT(TP) is not justified for revising the order on this issue u/s. 263 of the Act. The assessee succeeds on this issue.

10. The other legal issues raised by the assessee are left open.

11. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 20th day of February, 2024.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(LAXMI PRASAD SAHU)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 20th February, 2024.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.